IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3229 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Nos.1,2 & 4 Yes.
Nos.3 & 5 No.

MOHMAD SARIF @ KALIO NURMOHMADSARNIBAPU SHAIKH

Versus

COMMISSIONER OF POLICE.

Appearance:

MR DR BHATT for Petitioner

MR.NIGUM SHUKLA, A.P.P. for Respondents

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 24/09/96

ORAL JUDGEMENT

Through this Special Civil Application under Article 226 of the Constitution of India, the petitioner-detenu seeks to challenge his detention order dated 16.4.1996 passed by the Police Commissioner,

Ahmedabad City under the provisions of Gujarat Prevention of Antisocial Activities Act, 1985. The detention order was executed on the same day i.e. 16.4.1996 and since then the petitioner-detenu is under detention.

This Special Civil Application is filed in this Court on 30.4.1996 and on 1.5.1996 Rule returnable on 22.7.1996 was issued with the direction to the respondents to file an affidavit-in-reply, if they so desire. It is given out by Mr.Shukla, learned A.P.P.that the department was served with the notice of this petition on 23.6.1996. However, the respondents have chosen not to file any affidavit-in-reply to this petition and therefore, the factual allegations made by the petitioner-detenu in the petition remain uncontroverted. Mr.Shukla, learned APP has submitted that it has been the practice throughout to argue the detention matters without filing any affidavit-in-reply and only oral submissions are made at the time of arguments on the basis of the record available with the learned Addl.Public Prosecutor arguing the matters. It is a dismal fact that even in such matter of detention the respondents do not appear to be keen to defend the detntion order by filing appropriate affidavit-in-reply to the petition. Mr.Shukla has submitted that this practice has been going on. If such a practice has been going on it must be observed that this practice on the part of the respondents in not filing the reply to the petition challenging the detention order is highly deplorable. More particularly when there are catena of decisions by this Court as well as by the Supreme Court that when the detention orders are challenged an appropriate reply must be filed and there should also be an affidavit of the detaining authority itself on the question as to whether the order has been passed after due active and objective application of the mind or not. Every court is a guardian of its own records and master of its own practice and therefore the practice going on in the office of the learned Public Prosecutor cannot be in violation of the law laid down by this court and the practice which has been judicially recognised through judicial pronouncements at all levels. I am constrained to make this observation because even a short affidavit-in-reply has not been filed though it is stated by the learned Addl.Public Prosecutor that the Detaining Authority had been served way back on 6.5.1996 and the department had been served on 23.6.1996. The promptitude with which the detention orders are passed, is also required to be followed when the detention orders come for a judicial scrutiny before this Court on behalf of the detenu whose life and liberty stands checked. These

observations are hopefully made to the respondents so as to evoke the readier response in future and not to show scant regard either to the norms and the practice laid down by the Court's order or to the life and liberty of the citizens who are detained without trial.

So far as the challenge to the present detention order dated 16.4.1996 is concerned Mr.Bhatt appearing for the petitioner has submitted that the detention order is based on the criminal case dated 19.5.1993 being numbered 232 of 1993 in the area of Ellisbridge Police Station, dated 12.5.1995 being numbered 33/95 in the Police Station of Dariapur and dated 27.7.1995 being numbered 66/95 of Dariapur Police Station and the undisclosed statements with regard to the alleged incidents dated 22.3.1996 and 4.4.1996. It has also been submitted by Mr.Bhatt that the present petitioner-detenu has nothing to do with the Criminal Case No. 161 of 1995 dated 27.7.1995 of Kalupur Police Station and the petitioner-detenu was not an Accused of this case of Kalupur Police Station. It has been submitted by Mr.Bhatt that the orders have been passed without application of mind. The question with regard to the availability of lesser drastic remedy of taking steps under the provisions of Code of Criminal Procedure was not considered and he has further submitted that the privilege under section 9(2) of the Gujarat Prevention of Antisocial Activities Act, 1985 with regard to the incidents dated 22.3. 1996 and 4.4.1996 is not genuine and Mr.Bhatt has laid stress on the argument that the reliance was placed by the Detaining Authority on the verified statements without application of mind. He has cited the following decisions in support of his submissions.

[1] 22 GLR Pg. 1186 [Bai Amina w/o.Ibrahim Abdul Rahim Alla Vs. State of Gujarat & Others.

[2] 1992(3) J.T.(SC) Pg.261 [Pradeep Nilkanth Paturkar Vs. Shri S.Ramamurthi & Ors.

[3] 29(1)GLR Pg.313 [Der Punjua Fogal Vs. District Magistrate, Rajkot & Others.

[4] 1995(3)SCC Pg.237 [Mustakmiya Jabbarmiya Shaikh Vs. M.M.Mehta, Commissioner of Police & Others.

[5] AIR 1990 SC Pg.2069 [Ayub @ Pappukhan Nawabkhan Pathan Vs.S.N.Sinha & Another.

Mr.Shukla, learned A.P.P. has submitted that the reference to the Criminal Case No.161 of 1995 of Kalupur Police Station was made in the order only by way of narration of facts which came to light against the petitioner-detenu during the course of investigation and in the order it has not been said that the petitioner-detenu was involved in Criminal Case No.161 of 1993 and therefore, merely because in the order a reference has been made to this criminal case by way of narration, it cannot be said that the Detaining Authority has taken the petitioner-detenu to be an Accused in this case. According to him nothing turns out in favour of the petitioner-detenu on this basis.

So far as the statements which have been recorded with regard to the incidents dated 22.3.1996 and 4.4.1996 it has been submitted by the learned A.P.P.that the statements were recorded with regard to these incidents and the reasons for non-disclosure of the identity of these witnesses have been duly considered and also recorded in the order itself by the Detaining Authority. It has been submitted by Mr.Shukla, learned A.P.P. that the Detaining Authority had issued direction on 14.4.1996 to the Assistant Police Commissioner to verify the statements which were recorded on 10.4.1996 and after the verification of the statement was received, the order was passed on 16.4.1996. It has been pointed out by Mr.Shukla that the Detaining Authority has recorded on the basis of these statements in relation to the incident dated 22.3.1996 that the petitioner-detenu along with his companions had purchased certain commodities from the place of the business of the witness and had left without making payment and when the payment was demanded by the witness, the witness was beaten by him on the open road and not only this a sum of Rs.300/- was taken out from the pocket of the witness and the witness was also given threat and thus an atmosphere of terror was created. Similarly with regard to the incident dated 4.4.1996 on the basis of the verified statements it has been mentioned by the Detaining Authority in the order that at the corner of Khajuri Gali in Dariapur the witness was intercepted by the petitioner-detenu suspecting him to be the police informant. This witness was openly beaten and threatened by the petitioner-detenu and when the witness raised alarm people assembled there meanwhile the detenu brought out a knife and went to assail the people who had collected there, then the public ran away and thus fear of atmosphere had been created and the routine life

of the people living in this area was disturbed. In this view of the matter, according to Mr.Shukla, it cannot be said that the Detaining Authority did not apply its mind. It has also been submitted by Mr.Shukla that in the facts of this case, it cannot be said that non disclosure of the identity of the witnesses under section 9(2) of the Act was not genuine. The petitioner-detenu was found to be a dangerous person and accordingly the detention order was passed. Mr.Shukla placed reliance on AIR 1992(SC) Pg.979[Harpreet Kaur Vs. State of Maharashtra] and unreported decision of this court rendered on 10.7.1995 in Special Civil Application No. 4044 of 1995.

I have considered the submissions made on behalf of both the sides. In the facts of this case, so far the mention of Criminal Case No. 161 of 1995 of Kalupur Police Station is concerned, I agree with the contentions raised on behalf of the learned Addl.P.P. that it has been so made only by way of narration and once I find that the Detaining Authority itself has not taken the petitioner to be an Accused in this case it cannot be said that any prejudice has been caused to the petitioner-detenu while passing the detention order merely by a reference to the aforesaid criminal case by way of narration. Taking into consideration the principles which have been laid down in the various decisions which have been cited on behalf of both the sides,it is pointed out that there cannot be any quarrel with any of the proposition of law which have been laid down therein. But the question which requires consideration by this Court is only as to whether the principles which have been laid down by the Apex Court and this Court have been followed in the present case or not. Although, I do not find that in the facts of the present case the authority's satisfaction for non-disclosure of the identity of the witnesses with regard to the incidents dated 22.3.1996 and 4.4.1996 was not genuine and it appears that the Detaining Authority had reasons for with-holding the identity of these witnesses, the question which requires consideration in the facts of the present case is as to whether the Detaining Authority had applied its mind to the statements of these witnesses with regard to these incidents while forming an opinion so as to warrant the detention. The Detaining Authority may have ordered for the verification of the statement on 14.4.1996 and the verified statement may also have been made available to the Detaining Authority before passing of the order but the Detaining Authority has not filed any affidavit before this Court as to whether the detention order has been passed after due and active application of mind on

the entire material. No doubt the reference to certain criminal cases and the depositions made by the witnesses with regard to the incidents dated 22.3.1996 and 4.4.1996 has been made in the body of the order as has been pointed out by the learned Addl.P.P. but the mere reproduction of such statements in the body of the order cannot be said to be sufficient so as to show the active application of mind by the Detaining Authority at the time of passing of the order, more particularly when there is no contemporaneous evidence taken note of and considered by the Detaining Authority. During the course of arguments it was pointed out by the learned A.P.P. that statements with regard to the incidents dated 22.3.1996 and 4.4.1996 had been recorded on 10.4.1996 and except the contents of these statements there is no other contemporaneous evidence on the basis of which the Detaining Authority could form the opinion with reference to any contemporaneous evidence relating to the date of the respective incidents so as to form the opinion that petitioner-detenu was a dangerous person and that he should be subjected to the detention under the provisions of Gujarat Prevention of Antisocial Activities Act. When the verified statements are placed for consideration before the Detaining Authority, the Detaining Authority has to apply its mind and such application of mind must be made manifest in the body of the order itself and in any case when it is alleged that the order had been passed without application of mind, it must be shown before the Court by way of filing the affidavit or otherwise on the basis of some contemporaneous evidence and the reasons which can be said to be germane so as to warrant the detention. In the facts of the present case the contents of the detention order as such on the basis of the reproduction of the statements of witnesses, in absence of any affidavit by the Detaining Authority do not inspire confidence that there was due and active application of mind by the Detaining Authority on the statements which are said to have been verified with regard to this incident. The inevitable inference which can be drawn is that the Detaining Authority did not apply its mind seriously to the considerations to which he should have addressed himself before passing the order of detention so as to take the present petitioner to be a dangerous person and that he has become a threat to the public order and on overall consideration of the facts and circumstances it does appear that the Detaining Authority has failed to strike a balance between the Constitutional and the legal obligation charged upon him before passing the detention order and the manner in which the power of detention has been exercised in this case does not appear to have been exercised rationally

nor the Detaining Authority has cared to explain rationally with reference to the contents of this order before this Court by way of filing an appropriate affidavit. In such matters when the life and liberty of the citizens are put to jeopardy without trial and the detention orders are passed, the approach at no stage should be casual. Hire the power greater should be the restraint and caution and particularly in the matters of detention where on one side the constitutional rights are at stake, the legal obligation must also be discharged with great sense of responsibility even if the satisfaction to be derived is a subjective satisfaction such subjective satisfaction has to be based on objective facts. If the objective facts are missing for the purpose of coming to subjective satisfaction, in absence of objective facts the satisfaction leading to an order without due and proper application of mind may render the order to be unsustainable.

Upshot of the aforesaid discussion is that this petition is allowed. The detention order dated 16.4.1996 passed by the Respondent No.1 Commissioner of Police,Ahmedabad City is hereby quashed and set aside and the detenu is directed to be set at liberty forthwith, if not required in any other case. Rule is made absolute accordingly. Direct service is permitted.
